United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1155

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1155

IN RE APPLICATION OF THE UNITED STATES OF AMERICA IN THE MATTER OF AN ORDER AUTHORIZING THE USE OF A PEN REGISTER OR SIMILAR MECHANICAL DEVICE

PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

DANIEL R. MURDOCK,
Acting United States Attorney for the Southern District of New York, Attorney for the United States of America.

PETER D. SUDLER,
Special Attorney,
U.S. Department of Justice,
T. BARRY KINGHAM,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

STATUTES

OTHER AUTHORITIES CITED

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PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

Preliminary Statement

The United States of America respectfully petitions for rehearing, and suggests rehearing *in banc*, of that part of an opinion of a panel of this Court (Medina, Feinberg, *C.J.J.*) (Mansfield, *C.J.*, *dissenting*), filed July 13, 1976, which reversed an order of the United States District Court for the Southern District of New York (Tenney, *D.J.*) holding that the District Court had abused its discretion in requiring the New York Telephone Company to provide necessary information and technical assistance to the Government in the installation and operation of two penregisters.* *In re [illegible]cation . . . In the Matter of an Order Authorizing [illegible]se of a Pen Regis-*

* A pen register is a device for discovering the number of telephone numbers dialed from the instrument to which it is attached. *United States* v. *Focarile*, 340 F. Supp. 1033, 1038-40 (E.D. Md. 1972), *aff'd sub nom. United States* v. *Giordano*, 469 F.2d 522 (3d Cir. 1972), *aff'd* 416 U.S. 505 (1974). A pen register is not used to learn the contents of a call or even if a call was completed. (Slip op. at 4909).

ter, Dkt. No. 76-1155, slip op. 4903 (2d Cir., July 13, 1976).

Statement of the Case

By an order dated March 19, 1976, the Honorable Charles H. Tenney, United States District Judge for the Southern District of New York, directed the New York Telephone Company to provide information, facilities and technical assistance to Special Agents of the Federal Bureau of Investigation in connection with the installation and operation of certain pen registers.*

On March 30, 1976 the telephone company moved by order to show cause to vacate that part of the District Court's order which directed it to furnish technical assistance in the installation of the pen registers in question. That motion was denied in a nine-page opinion by Judge Tenney on April 2, 1976.

The telephone company appealed and on April 22, 1976 a panel of this Court (Medina, Feinberg and Mansfield, *C.J.J.*) heard oral argument. On July 13, 1976, the panel in a split decision (Mansfield, *C.J.*, dissenting) reversed that part of the District Court's order mandating telephone company assistance in the installation of the pen registers.

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* The March 19, 1976 order was one of a series of orders issued pursuant to an ongoing criminal investigation of an organized gambling operation. Previously the Government had obtained an order authorizing the interception of wire communications over another telephone at a different location. That order was authorized pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.* (Title III) and was accompanied by an order authorizing the use of a pen register. The Telephone Company complied with both of those orders by providing the required technical assistance (including lease lines). The March 19, 1976 order, although part of the same gambling investigation, was not authorized pursuant to Title III inasmuch as it did not seek to intercept wire communications.

The majority (Medina, Feinberg, *C.J.J.*) concluded that, although the District Court had the power to order the use of a pen register upon a showing of probable cause and, *arguendo*, under the All Writs Act, 28 U.S.C. 1651 (a), to compel the telephone company to assist in its installation, it was an abuse of discretion to order the telephone company to provide such third party assistance in the absence of express statutory authority for such an order. The majority recognized that without such assistance the order authorizing the use of the pen register was useless and that the effort required of the telephone company was minimal and involved no risk of company liability to its subscribers. (Slip op. at 4914). Nevertheless, because Title III expressly provides for ordering such third party assistance where wiretaps are involved, and because "such an order could establish a most undesirable, if not dangerous and unwise, precedent for the authority of federal courts to impress unwilling aid on private third parties" (slip op. at 4915), the District Court was found to have abused its discretion in directing the telephone company to cooperate. The majority expressed its view that Congress was better able than the Courts to define the situations in which requiring third-party cooperation would be appropriate.

Judge Mansfield's dissent began by pointing out that well-settled precedent made it clear that the All Writs Act entitles courts to issue orders which are essential to implementation of its decrees.* Since the telephone company's assistance was essential to implementation of the pen register order—an undisputed fact—, Judge Mansfield concluded that the District Judge had statutory authority to issue his order to the telephone company. With respect to the question of whether the District Judge had abused his discretion, Judge Mansfield found not the slightest support for the majority's conclusion. He observed:

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* The power of the District Court under the All Writs Act to issue the order to the telephone company was assumed only *arguendo* by the majority.

". . . I find it impossible on this record to accept the majority's conclusion that it was an abuse of discretion to direct that such assistance be rendered in this case. As the majority opinion notes, the assistance of the Telephone Company was here necessary for the installation of the pen register; due to the physical peculiarities of the location to be put under surveillance it would have been difficult, if not impossible, for the agents to install the device on their own without detection. Furthermore, the Telephone Company concedes that the assistance required of it was not burdensome; all that was required was the provision of certain plans and the flicking of a switch at a central terminal. Finally, the intrusion into the privacy of the targets of the surveillance and their communicants was less than would occur had the government sought authorization of a Title III wiretap; only the destination, not the content, of telephone messages was to be monitored.[1] It is the function of the district court to weigh such considerations when exercising its discretion, and in this case the balance clearly points toward requiring Telephone Company assistance.

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[1] It is possible that the result of the holding that the Telephone Company cannot be required to give assistance in the installation of a pen register may be, paradoxically, to increase the amount of electronic surveillance. Since the Telephone Company can be required under the 1970 amendment to Title III, 18 U.S.C. § 2518(4), to provide assistance in installing a Title III wiretap, law enforcement agents may be compelled to seek such wiretap authority in order to receive Telephone assistance, even if the primary interest lies simply in determining the locations to which calls are placed rather than in the monitoring of content which the wiretap would permit." (Slip. op. at 4919).

Turning to the principal arguments advanced by the majority in finding an abuse, Judge Mansfield found no support for the majority in the 1970 amendments to Title III which specifically authorize Courts to require telephone company assistance in the installation of wiretaps. That amendment was a reaction to, not an expression of congressional agreement with, the Ninth Circuit's decision in *Application of the United States*, 427 F.2d 639 (9th Cir. 1970), which held that a Court had no power under the All Writs Act to compel telephone company assistance in the installation of a wiretap.

Addressing the majority's argument that, while an assistance order might be desirable in the circumstances of this case, it would be the initial step down a slippery slope in which law enforcement personnel would obtain orders requiring for more onerous assistance from third parties, Judge Mansfield noted that the majority was expressing a unprecedented lack of confidence in Federal District Judges:

> "We have had sufficient confidence in our district judges over the past century to vest them with discretionary power to issue such extraordinary relief as temporary restraining orders and preliminary injunctions. I see no reason for not trusting them to employ sensible standards in deciding whether auxiliary relief should be granted under the All Writs Act. Because of the combination of clear necessity for Telephone Company assistance and the minimal burdens on that company, this is a case where application of such standards mandates assistance from the Telephone Company. Were the necessity lesser, or the burden greater, in some future case, a district court might not be justified in invoking its extraordinary powers. That is what exercise of discretion is all about. I see no reason to assume that the district courts will in the future

> grant law enforcement agencies such relief on anything less than a showing of the compelling nature here made, or that, in reviewing such orders, future panels of this court will be any less sensitive than the present majority to the problems involved." (Slip op. 4921-23).

Nor did Judge Mansfield agree that Congress, as opposed to the federal courts, was in a superior position to define the conditions under which third party assistance should be required. Since the granting or withholding of assistance inevitably turns on the unique circumstances of each case, this subject, he felt, was far better suited to judicial, not legislative, decision-making.

Reasons for this Petition

The panel's 2 to 1 decision in this "important" case (slip op. at 4904) should be reheard, preferably by an *in banc* Court, for three reasons.

First, there can be no question about the significance of this case. The majority's decision, if permitted to stand, will have disastrous consequences for law enforcement in the Second Circuit by granting *carte blanche* to the telephone company to decide when and under what circumstances, if any,* it will cooperate in the installation of court authorized pen registers.**

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* At this point it is the telephone company's position that installation assistance will only be forthcoming when the pen register order is accompanied by an order authorizing the interception of wire communications pursuant to Title III.

** Pen registers have become a common device through which law enforcement agents can—when probable cause is demonstrated to the satisfaction of a District Judge—learn the phone numbers

[Footnote continued on following page]

This is plainly so because, while the majority's decision is couched in terms of "an abuse of discretion," even a cursory reading makes clear that the majority simply viewed District Judges as without power to order third party assistance in the installation of pen registers.

Secondly, we respectfully submit, as we more fully detail in the "Argument" section of this petition and as the dissent makes clear, that the decision of the panel's majority, which in effect abdicates judicial responsibility to determine whether pen registers should be installed, is ill-conceived and cannot withstand analysis. Moreover, if the panel's decision is permitted to stand its ultimate and paradoxical effect may well be to cause far greater intrusions on the privacy of investigated individuals, since the telephone company can be compelled to install a pen register under Title III if the Government obtains a wiretap order.

Thirdly, rehearing is necessary here because to fail to rehear this case may force the Supreme Court to review an issue which it might otherwise find unnecessary to consider. The decision of the panel is in direct conflict with the Seventh Circuit's decision in *United States* v. *Illinois Bell Telephone Co.*, 531 F.2d 809 (7th Cir. 1976), and the Supreme Court has long recognized its obligation to review conflicts among the circuits, particularly when, as here, the issue in dispute if of the great importance to the administration of justice. See Supreme Court of the United States Rule 19(1)(b); Stern & Gressman, Su-

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to which targeted individuals are placing phone calls. This information is often essential to the effective prosecution of persons who engage in large scale criminal enterprises requiring the use of telephone communications, and often, because of the physical location of these lines, cannot be obtained without the assistance of the telephone company.

preme Court Practice, § 4.4, at 154-58 (4th ed. 1969).* Accordingly, if the panel's decision does not receive *in banc* treatment, the Supreme Court may well be obliged to unnecessarily resolve a conflict between this Circuit and the Seventh Circuit.

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* During the October 1974 Term of the Supreme Court, the Supreme Court decided only 159 cases by full opinion. Resolution of inter-circuit conflicts was a basis for the granting of certiorari in 26 of those cases: *Otte* v. *United States*, 419 U.S. 43 (1974); *Saxbe* v. *Bustos*, 419 U.S. 65 (1974); *Gulf Oil Corp.* v. *Copp Paving Co., Inc.*, 419 U.S. 186 (1974); *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974); *ITT* v. *Electrical Workers, Local 134*, 419 U.S. 428 (1974); *Train* v. *City of New York*, 420 U.S. 35 (1974); *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1974); *United States* v. *New Jersey State Lottery Commission*, 420 U.S. 371 (1974); *Serfass* v. *United States*, 420 U.S. 377 (1974); *Burns* v. *Alcala*, 420 U.S. 575 (1974); *Reid* v. *INS* 420 U.S. 619 (1974); *United States* v. *Feola*, 420 U.S. 671 (1974); *Iannelli* v. *United States*, 420 U.S. 770 (1974); *Train* v. *National Resources Defense Council, Inc.*, 421 U.S. 60 (1974); *United States* v. *Wilson*, 421 U.S. 309 (1974); *Phelps* v. *United States*, 421 U.S. 330 (1974); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1974); *United States* v. *Park*, 421 U.S. 658 (1974); *Murphy* v. *Florida*, 421 U.S. 794 (1974); *Intercountry Construction Corp.* v. *Walter*, 422 U.S. (1974); *Rogers* v. *United States*, 422 U.S. 35 (1974); *Rondeau* v. *Mosinne Paper Corp.*, 422 U.S. 49 (1974); *United States* v. *Hale*, 422 U.S. 171 (1974); *Albernarle Paper Co.* v. *Moody*, 422 U.S. 405 (1974); *Ivan Allen Co.* v. *United States*, 422 U.S. 617 (1974); *Bowen* v. *United States*, 422 U.S. 916 (1974).

ARGUMENT

The Decision of the Majority Does Not Withstand Scrutiny.

Two arguments underlie the majority's conclusion that the District Court abused its discretion in ordering the telephone company to assist in the installation of pen registers. The first is that Congress' specific enactment of amendments to Title III, authorizing courts to compel third parties to provide technical assistance in the installation of wiretaps, suggests "that similar [congressional] authorization should be required in connection with pen register orders . . . ." (Slip op. at 4915). The second argument is that an order compelling third party assistance could establish "a most undesirable, if not dangerous and unwise, precedent for the authority of federal courts to impress unwilling aid on third parties," because "there is no assurance that the court[s] will always be able to protect . . . third part[ies] from excessive or overzealous Government authority or compulsion." (Slip op. at 4915-16). Neither of these arguments withstands analysis.

Particularly unpersuasive is the suggestion that Congress' enactment of amendments to Title III,* authorizing the compelling of third party assistance in the installation of wiretaps, supports a conclusion that Congress views the federal courts as being without inherent power to order third party assistance in the installation of pen registers. The amendments to Title III were brought on by a Ninth Circuit decision which had held that, in light of the highly technical and comprehensive statutory scheme provided for in Title III, the absence of provisions authorizing courts to order third party assistance must have meant that Congress did not intend to authorize compulsion of third party assistance. *Application of the*

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* See 18 U.S.C. § 2518(4).

United States, 427 F.2d 639 (9th Cir. 1970). That decision resulted in Congress promptly amending Title III to make clear that third party assistance could be compelled.

There is nothing in the meager legislative history of these amendments which suggests that Congress envisioned itself as imbuing the courts with powers they did not already possess, as opposed to simply responding to an incorrect decision of the Ninth Circuit. Moreover, as Judge Mansfield correctly pointed out in dissent, the Supreme Court has long cautioned against inferring from a congressional grant of authority to an agency Congress' view that the agency previously lacked such authority. (Slip op. at 4920). See *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950).*

Accepting that Congress' amendment to Title III tells us very little about its views of the courts' inherent powers to compel third party assistance, the amendments do tell us something. First, in an area which entails far more intrusive entries into the privacy domains of telephone subscribers than mere pen registers, Congress views it as appropriate for the Courts to order third-party assistance. Secondly, the enactment of these amendments makes clear that Congress is not concerned that blanket authorization to the courts to compel third party assistance in the installation of wiretaps will permit undue invasion of the privacy rights of these third parties.

Moreover, in assessing Congress' view of the power of the courts to compel third party assistance, the majority gave totally inadequate consideration to the All Writs Act. The majority commenced its analysis by assuming

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* This is simply an analogue of the well-established principle that, "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U.S. 61, 69 (1946).

arguendo that the All Writs Act provided the District Court with discretionary power to order third party assistance. (Slip op. at 4913). Two pages later in its opinion, however, the majority found an abuse of the District Court's discretion in ordering third party assistance, because the District lacked statutory authority for exercising its discretion! In short, what the majority so clearly failed to recognize is that, if the All Writs Act confers statutory authority to order third party assistance—as Judge Mansfield so plainly demonstrated it does in dissent **—, then the question of the effect of the Title III amendments is of no consequence.

The second string to the majority's bow is even weaker. The majority conceded (1) that the District Court had properly found probable cause when it ordered the installation of the pen register, (2) that the assistance of the telephone company was essential to the installation of the pen register, and (3) that the required assistance would not be burdensome, involving literally the flick of a switch. Yet the majority concluded that an abuse of discretion had been committed, because in *some imaginary future case* the Courts might not be able to protect third parties compelled to provide assistance "from overzealous Government activity or compulsion."

Whatever this reasoning is called—a "slippery slope" or the painting of "imaginary devils"—it is remarkably unpersuasive. The Founding Fathers envisioned the judiciary as the guardian of the constitutional rights of the people. See I Annals of Cong. 439 (1834) (Madison). But here the majority tells us that the Courts are inadequate to this task and that Congress is better suited

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** We cannot hope to improve on Judge Mansfield's analysis of the powers which the All Writs Act confers on the federal courts, and we will therefore not attempt to do so. (See slip op. at 4917-19).

to it, because the Courts cannot be trusted to protect against overzealous Government activity.

Judge Mansfield's dissent fully disposes of this argument. First, the majority's vote of no confidence in Federal District Judges is as unprecedented as it is unjustified. District Judge's regularly issue such extraordinary relief as temporary restraining orders and preliminary injunctions. Moreover, judicially required assistance by citizens and businesses in an everyday occurrence in our judicial system. Subpoenas are regularly directed to witnesses compelling their testimony and the production of documents, and District Judges are charged with protecting against improper use of the subpoena power. See, *e.g.*, *In re Horwitz*, 482 F.2d 72 (2d Cir. 1973). There is simply no basis—historocally or otherwise—for the majority's unembellished expression of belief that District Judges have been, or will be, incapable of employing sensible standards in deciding whether auxiliary relief should be granted under the All Writs Act. *Cf. Faubus* v. *United States*, 254 F.2d 797 (8th Cir. 1958); *United States* v. *Wallace*, 218 F. Supp. 290 (N.D. Ala. 1963).

The final irony is that the majority's capitulation to the telephone company's position permits the company, during the judiciary's abdication, to impose *its* values in deciding whether pen registers are appropriate in a given case. It is significant in this regard that the telephone company's concern about indiscriminate invasions of privacy seems limited to matters concerned with violations of general Federal criminal statutes and not those constituting frauds against the telephone company. See *United States* v. *Clegg*, 509 F.2d 605 (5th Cir. 1975); *United States* v. *DeLeeuw*, 368 F. Supp. 426 (E.D. Wis. 1974). Moreover, the telephone company's position, urged both in the District Court and on this

appeal, is that the Government should seek Title III authorization before seeking a pen register order if telephone company assistance is needed. Paradoxically, as Judge Mansfield noted in his dissent, this will undoubtedly increase the amount of electronic surveillance by compelling "law enforcement agents to seek wiretap authority even if their primary interest lies simply in determining the location to which calls are placed rather than in the monitoring of content which the wiretap would permit." (Slip op. at 4919).

In sum, the decision of the majority in this case not only frustrates Federal law enforcement efforts, but also, in an unprecedented and unprincipled manner, abrogates the authority of Federal District Judges. In both respects, it is an unfortunate and dangerous precedent which should be reversed.

CONCLUSION

The opinion of the majority in this case should be modified to reverse the decision that the District Court abused it discretion in ordering the telephone company to provide assistance in the installation and operation of pen registers.

DANIEL R. MURDOCK,
Acting United States Attorney for the Southern District of New York, Attorney for the United States of America.

PETER D. SUDLER,
Special Attorney,
U.S. Department of Justice,
T. BARRY KINGHAM,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PETER D. SUDLER being duly sowrn. deposes and says that he is employed in the office of the Strike Force for the Southern District of New York.

That on the 30th day of August, 1976 he served two copies of the within Petition for Rehearing by placing the same in a properly postpaid franked envelope addressed:

George B. Ashley, Esquire
New York Telephone Company
1095 Avenue of the Americas
New York, New York 10036

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse. Foley Square. Borough of Manhattan. City of New York.

Peter D. Sudler

PETER D. SUDLER
Special Attorney
U.S. Department of Justice

Sworn to before me this
30th day of August, 1975

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977